

MEMORANDUM OF LAW

DATE: November 10, 1994

TO: Mitchell Berner, Chief of Staff for Councilmember Warden,
District 5

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Arising from Location of
Personal Residence/Participation in San Pasqual Valley
Community Plan Update

By memorandum dated September 23, 1994, you have asked the City Attorney for a legal opinion as to whether Councilmember Warden has a conflict of interest preventing her from participating in or voting on matters pertaining to the San Pasqual Valley Community Plan Update, because her residence is located very near that community. This is in response to that opinion request.

BACKGROUND

I have obtained the following facts from various sources, including your original memorandum, the draft San Pasqual Valley Plan Update document (distributed July 1994), a San Diego County Assessor's Parcel Map (Book 272, page 48, Sheet 2 of 2), Map No. 1150 of the Thomas Brothers' maps for San Diego County, an "informal" subdivision map of the Bernardo Trails region, and an 800 foot scale aerial photo of the area. I have also discussed these matters with you over the telephone, and I have met with Senior Planner Charles Studen and Associate Planner Bernard Turgeon, who are working on the plan update.

Councilmember Warden and her husband own and live in a single family residence^F

Although you have provided the Councilmember's exact address, I decline to place it in this memorandum, since it will become a public record as soon as it is issued. The Councilmember is not required to disclose her personal residence. Government Code section 87206(f).

in a community known as the Trails in Rancho Bernardo, which is a part of The City of San Diego. The Councilmember is a member of the Trails Homeowners' Association and her husband is the President. Members of the Trails Homeowners' Association hold property in common in the community, including open and closed hiking and horse trails. The Trails community comprises 280 lots on 390 acres.

The draft San Pasqual Valley Community Plan Update ("Plan Update") has been available to the public since July 1994. The time period for public comment on it has only recently closed. The revised draft and accompanying Environmental Impact Report ("EIR") are scheduled to be ready by the end of November 1994. A San Diego Planning Commission Workshop on this topic is scheduled for January 1995. The noticed public hearing in front of the Planning Commission on the Plan Update is scheduled for April 1995. The full Council is scheduled to hear and consider the Plan Update in June 1995.

Most of the land in the San Pasqual Valley Community Plan boundaries is open space and is owned by The City of San Diego's Water Utilities Department. According to Mr. Studen, the following three projects in the proposed update are controversial: 1) to replace current open space with a proposed golf driving range; 2) to replace current open space with a proposed regional shopping center to be located immediately to the south of an existing regional shopping center, which itself is located in the City of Escondido and which is known as North County Fair; and, 3) to widen Highland Valley Road from two (2) to four (4) lanes.

The Trails community is adjacent to the San Pasqual Valley Community. The boundaries of the Community Plan are not proposed to be changed by this update process. The Councilmember's residential lot is approximately 800 feet from the nearest San Pasqual Valley Community Plan boundary, however, some portions of the boundary of the property held in common by the Trails Homeowners' Association are virtually coincidental with some portions of the San Pasqual Valley Community Plan boundary.

The Councilmember's residence is located well outside a 2500-foot radius from both the proposed golf driving range and the proposed regional shopping center. The westernmost boundary of the Trails community is approximately 1200 feet from one of the easternmost boundaries of the proposed golf driving range.

In fact, there is more than one proposed eastern boundary for the proposed golf driving range. The other proposed boundaries are further away from the boundary of the Trails community.

The northwestern

boundary of the Trails community is approximately 4800 feet from the southern boundary of the proposed regional shopping center. Her residence is located approximately 1400 feet as the crow flies from Highland Valley Road. The northernmost boundary of the Trails community is within 150-200 feet of existing Highland Valley Road.

APPLICABLE LAW

In lieu of reciting the applicable law pertaining to conflicts of interest arising out of ownership of a residence near a proposed project site, I have attached a copy of a Memorandum of Law dated May 24, 1994,

to Councilmember Mathis which recites much of the relevant law in detail. In addition to the legal issues raised in that opinion, the facts presented here also raise issues of whether discussions on, participation in and voting on the update of the Community Plan may be bifurcated. In other words, assuming it is found that the Councilmember has a potential conflict of interest, may decisions in which she has a financial interest be segregated from other decisions in which she does not have a financial interest, so that she may then participate as to the other components of the Community Plan?

In private advice letters, the Fair Political Practices Commission ("FPPC") has opined that "large, complex decisions under certain circumstances may be divided into separate decisions when an official has a disqualifying interest in one component of the decision which is not interdependent upon other components. The official may then participate as to the other components in which she has no financial interest." FPPC Priv. Adv. Ltr. A-94-013 (Feb. 22, 1994).

According to this and other private advice letters, the Councilmember may participate in some decisions pertaining to the Community Plan Update if the procedure described below is followed:

(1) The decision in which the public official has a disqualifying financial interest is segregated from the other decisions.

(2) The decision in which the public official has a financial interest is considered first, and a final decision is reached by the legislative body without the participation of the public official. This decision must be final and not subject to change by other subsequent decisions regarding the proposed governmental decision.

(3) Once a final decision has been reached on the matter that has a material financial effect on the public official's economic interests, the public official may participate in the deliberations and vote regarding other components of the governmental decision, so long as these deliberations and votes do not affect the previous decision or decisions from which she was disqualified.

Note, however, that the FPPC has also opined that a series of decisions may be too interrelated to be considered separately. For example, decisions regarding the circulation element of a plan (traffic and roadways) are not readily bifurcated from other decisions in a land use plan. See, for example, Priv. Adv. Ltr. A-94-013 (Feb. 22, 1994), at 7.

ANALYSIS

The Councilmember has a combined economic interest of \$1,000 or more in her personal residence and in portions of land in the Trails community held in common by the homeowners' association.^F

I was not provided with separate figures for the value of the Councilmember's economic interest in her residence and that of her interest in the properties held in common by the Trails Homeowner's

Association. For purposes of this memorandum, I find that she has a real property interest that exceeds \$1,000.

This economic

interest triggers examination of whether the City's decisions pertaining to the proposed San Pasqual Valley Community Plan Update will have a material financial effect on that economic interest, thereby disqualifying her from participating in the decisions.

The Councilmember's residence is only about 800 feet from the nearest boundary of the San Pasqual Valley Community. Additionally, portions of the boundary of property held in common by members of the Trails Homeowner's Association are virtually coincidental with portions of the Community Plan area's boundary. Therefore, it is reasonably foreseeable that the Community Plan update process will have some financial effect on the Councilmember's residence and its common area. The next question ---indeed the central issue posed by your inquiry---is whether the City's decisions on the Community Plan amendments will have a material financial effect on the Councilmember's economic interest in her residence and its common area.

I. Materiality of Financial Effect

As noted in footnote 3, I have assumed for purposes of this memorandum that the Councilmember's combined interest in her residence and in the common area held by the Trails Homeowners' Association is worth \$1,000 or more. I received no separate information as to the value of her interest in her residence as distinguished from the value of her interest in the commonly held properties. It is not possible to provide a definitive answer to the question presented without a separate valuation of her financial interests in her residence and in the property held in common in the Trails community.

A. Property Within 300 Feet

Under Title 2, Division 6, section 18702.3(a)(1), of the California Code of Regulations, if a public official's property is located within 300 feet of the subject property, the public official must show that there will be no financial effect on the official's property to avoid a finding of materiality. This regulation in essence creates a presumption of materiality when the public official's property boundaries are within 300 feet of the subject property's boundaries.

In the present instance, the boundary of the Trails community is coincidental with the boundary of the Community Plan. Hence, assuming the amount of her economic interest in the commonly held properties is \$1000 or more, the burden will be on the Councilmember to show that there will be no material financial effect on her financial interest in the commonly held property resulting from City decisions pertaining to the San Pasqual Community Plan. That is a factual determination that the City Attorney is unable to make. Rather, this determination must be made by either a real property appraiser or another qualified person, as

explained below.

According to a recent private advice letter from the FPPC, a public official may, but is not required to, retain an appraiser to assess the materiality of a financial effect of a governmental decision on his or her property. A public official will be considered to have made a "good faith" effort to determine materiality of financial effect, if the public official has a person "qualified" to determine the value of real property apply the factors outlined in the FPPC's materiality regulations to reach a determination. FPPC Priv. Adv. Ltr. A-93-403 (Jan. 27, 1994).

Under this private advice letter ruling, either a real property appraiser or another "qualified" person must make the determination for the Councilmember as to whether decisions on the Plan Update will have a material financial effect on the commonly held properties located less than 300 feet away from the Community Plan boundaries.

B. Property Between 300 and 2500 Feet

For properties located between 300 and 2,500 feet from the subject property, the result of a governmental decision will be material if there is a reasonably foreseeable change (increase or decrease) in the fair market value of \$10,000 or more, or change (increase or decrease) in rental value of \$1,000 or more per twelve month period, in the public official's property. 2 Cal. Code of Regs. Section 18702.3(a)(3). The factors to be applied to determine the change in fair market or rental value of the Councilmember's property, if any, are set forth in 2 Cal. Code of Regs. Section 18702.3(d) and are quoted in the Memorandum of Law to Councilmember Mathis of May 24, 1994, at page 7. These factors will not be repeated here.

Again, the issue of materiality of financial effect on the Councilmember's personal residence is a factual determination that the City Attorney is not qualified to make. It will be necessary for the Councilmember to have this determination made by a real property appraiser or someone else who is "qualified" to make these types of determinations.

C. Property Over 2500 Feet

Lastly, for properties more than 2,500 feet from the subject property, a governmental decision will not be material unless special circumstances would make the fair market or rental value of the official's real property change by the amounts stated above and there will not be a similar effect on at least 25% of all properties within 2,500 feet of the public official's property or there are not at least ten other properties within 2,500 feet of the official's property. 2 Cal Code of Regs. Section 18702.3(b)(1) and (2).

The Councilmember's personal residence is well over 2,500 feet from both the proposed golf driving range and the proposed regional shopping

center. The commonly held properties are approximately 4,800 feet from the southern boundary of the proposed regional shopping center. Therefore, it is necessary to apply the rule set forth in 2 Cal. Code of Regs. Section 18702.3(b)(1) and (2) to determine the materiality of financial effect on the Councilmember's residence and the surrounding common area. Again, this is a factual determination for a real property appraiser or other "qualified" person to make.

D. Potential Bifurcation of Decisions Pertaining to the San Pasqual Valley Community Plan Update Process

Assuming for purposes of discussion only that the Councilmember may not participate in all decisions pertaining to the Plan Update, because of the location of either her residence or the common area, may she nonetheless participate in others that do not pose a conflict? As pointed out earlier in this memorandum, at pages 3-4, the FPPC has stated that bifurcation of governmental decisionmaking is permitted if certain procedures are followed. Whether the San Pasqual Community Plan Update may be bifurcated into separate issues is a factual determination, to be decided based on the procedures outlined at pages 3-4 of this memorandum, which the City Attorney is not qualified to make. I recommend that the Councilmember ask the City Manager for assistance in resolving this issue.

II. Public Generally Exception

Only for purposes of discussing the issue of whether the "public generally exception" applies, I assume that the Councilmember has a conflict of interest that prevents her from participating in any or all of the governmental decisions pertaining to the San Pasqual Community Plan Update. For a thorough explanation of the "public generally" exception, I refer you to the Memorandum of Law addressed to Councilmember Mathis cited above. Although the FPPC has not ruled that either a real property appraiser or other qualified person is required to determine whether the public generally exception applies, the criteria set forth in 2 Cal. Code of Regs. Section 18703 clearly require factual determinations, which the City Attorney is not qualified to make. Therefore, I recommend that the Councilmember seek assistance from the City Manager to make these determinations.

III. Council Policy 000-4 -- The City Council's Code of Ethics

In 1967, the City Council adopted a "Code of Ethics" governing elected and appointed officials and employees of the City. Under this policy "No elected official . . . shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his or her official duties or would tend to impair his or her independence or judgment or action in the performance of such duties." Assuming it is determined that the Councilmember is not prevented by the Political Reform Act from participating in or voting on decisions pertaining to the San Pasqual Community Plan Update, she

should consider whether she is able to participate in those decisions under the terms of this policy by reason of her membership in the Trails' Homeowners' Association or of her husband's presidency of that organization. If, after examining her own conscience, she determines that she is to render impartial decisions pertaining to the Plan Update, despite her personal interest in the Homeowners' Association, she may vote. If not able to stay impartial, she should refrain from participation in the decisions.

CONCLUSION

This memorandum examines whether Councilmember Warden is disqualified from participating in and voting on the San Pasqual Community Plan Update, because of potential conflicts of interest arising from the proximity of her residence and its surrounding common area to the San Pasqual Valley community's boundaries. I conclude that she will not be disqualified from participating and voting unless it is determined that:

- (1) her economic interest in her residence and its surrounding common area will be materially financially affected by the City's decisions on the Plan Update; and
- (2) the decisions pertaining to the Plan Update process cannot be bifurcated; and,
- (3) the "public generally" exception does not apply.

These three questions all require factual determinations by a real property appraiser or qualified person. The City Attorney is unable to reach a final conclusion absent those determinations.

Assuming it is found that the Councilmember does not have a financial conflict of interest under the Political Reform Act that would disqualify her from participating in or voting on the San Pasqual Valley Community Plan Update, this memorandum suggests that the Councilmember examine whether she has a duty to refrain from participation in these matters under Council Policy 000-4.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

CCM:js:jrl:011:(x043.2)

cc Charles Studen

Attachment

ML-94-87